

May 24, 2005

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

*Appeal*

Name of Petitioner: State of Nevada

Date of Filing: January 5, 2005

Case Number: TFA-0083

On January 5, 2005, the State of Nevada (the Appellant) filed an Appeal from a determination that the Office of Civilian Radioactive Waste Management (OCRWM) of the Department of Energy (DOE) issued on November 24, 2004. In its determination, OCRWM partially denied the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OCRWM to release the information it withheld and to conduct a further search for responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

***I. BACKGROUND***

DOE is required to apply to the Nuclear Regulatory Commission for a license to construct the Yucca Mountain Project ("YMP"). In its May 27, 2004 FOIA request, Appellant requested documents regarding DOE's Licensing Support Network ("LSN") database for the YMP. On November 24, 2004, OCRWM issued a Determination Letter stating that it had identified a number of documents as being responsive to the Appellant's FOIA request. Determination Letter dated November 24, 2004, from Kenneth W. Powers, OCRWM, to Charles J. Fitzpatrick. In the Determination Letter, OCRWM stated that it was releasing some of the documents to the Appellant in full and it was withholding the remaining documents in their entirety. *Id.* OCRWM asserted that the withheld documents were prepared by or for an attorney and are thus privileged and exempt from release pursuant to Exemption 5 of the FOIA. *Id.* The Appellant subsequently filed this Appeal.

## II. ANALYSIS

### A. Adequacy of the search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988). The Appellant makes a number of arguments that OCRWM did not provide all documents responsive to its FOIA request.

The Appellant essentially argues that OCRWM did not conduct an adequate search for responsive documents because OCRWM failed to locate a number of specific documents that the Appellant had identified from other documents in its possession. In general, OCRWM has informed us that it had, in fact, located the documents the Appellant specifically identified but did not address most of them in its determination because it found that they were not responsive to the request. We discuss these documents below.<sup>1/</sup>

One document that the Appellant identified but which OCRWM did not provide is entitled a "Requirements Traceability Matrix." OCRWM has informed us that the Requirements Traceability Matrix is not a responsive document as it does not deal with "standards or criteria," which was an element of the request. February 9, 2005 Memorandum at 2 ("Memorandum"), from Diane Quenell, FOIA Officer, Office of Repository Development, OCRWM, to Janet R. H. Fishman, OHA. OCRWM's explanation lacks sufficient detail to permit us to determine whether this document is in fact responsive to the Appellant's FOIA request. Because we are remanding a significant portion of this matter back to OCRWM, we will require OCRWM on remand to issue another determination concerning whether this document is responsive.<sup>2/</sup>

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<sup>1/</sup> OCRWM asserts that several of the documents identified by the Appellant were responsive but were properly withheld under Exemption 5 of the FOIA. We will address OCRWM's Exemption 5 claims in Section B below.

<sup>2/</sup> Even if this document is not responsive to the Appellant's recent FOIA Request, it is obvious that the Appellant desires it and could easily make another FOIA request for it. OCRWM may wish to consider whether it would not be more administratively efficient either to release this document to the Appellant or issue a determination letter explaining why this document must be withheld from release under the FOIA.

The Appellant next claims that “information letters sent to responsible managers” which the Appellant and OCRWM identified as having been dated March 22, 2004, were not included with OCRWM’s determination. Appeal letter at 4. The Appellant is correct. However, OCRWM has stated to us that these letters contain no information regarding the LSN database, but merely transmit that information. Memorandum at 2. Consequently, the letters are not responsive to the Appellant’s FOIA request and OCRWM was not required to release them to the Appellant.<sup>3/</sup>

The Appellant also contends that a document referencing training procedures that were “conducted covering the identification and submission to [CACI, Inc.] of potentially relevant documents” exists but was not provided by OCRWM. Appeal letter at 5. OCRWM has informed us that the document the Appellant identified above was in fact released to the Appellant. In its Determination Letter, OCRWM identified it as a Memorandum from Ms Otis and Dr. Chu. Memorandum at 2.

The Appellant also claims that a document attached to an electronic mail message, which stated it included information on the status of the LSN resizing efforts, must exist yet was not released. Appeal letter at 5. OCRWM states it will provide a copy of this document directly to the Appellant. Memorandum at 4.

The Appellant has also identified other documents as not having been released, and OCRWM has confirmed the existence of these documents in the Memorandum. However, in the Memorandum, OCRWM has determined those documents were not responsive to the Appellant’s request but did not provide any justification for this determination. We will remand this matter back to OCRWM to make a formal determination regarding whether the remaining identified documents are responsive to the Appellant’s FOIA Request.<sup>4/</sup>

In sum, OCRWM’s search was reasonably calculated to discover responsive documents. It did, in fact, uncover the documents that the Appellant believed it had overlooked. For the reasons stated above, we believe that this part of the Appeal should be granted with respect to the electronic mail

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<sup>3/</sup> Again, it is apparent that the Appellant is interested in these documents. OCRWM may wish to consider whether it would not be more administratively efficient either to release these documents to the Appellant or to issue a determination letter explaining why these documents must be withheld from release under the FOIA.

<sup>4/</sup> See n.3 *supra*.

message mentioned above, denied with respect to the information letters and the memorandum from Ms Otis and Dr. Chu, and otherwise remanded to OCRWM for further processing.

### *B. Exemption 5*

Exemption 5 of the FOIA protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 incorporates every civil discovery privilege which the government enjoys under statutory and case law. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 7799 (1983); *FTC v. Grolier*, 462 U.S. 16, 19-27 (1983); *Renegotiation Board v. Grumman Aircraft & Engineering Corp.*, 421 U.S. 164, 184 (1975). Therefore, any communication that is privileged in civil discovery is also shielded from mandatory disclosure under Exemption 5. *Id.* Accordingly, if the requested documents fall within a civil discovery privilege, they may be withheld under Exemption 5.

#### *1. Adequacy of Justification*

In its determination, OCRWM withheld over 600 pages of documents claiming that the documents were exempt from disclosure under Exemption 5 of the FOIA. OCRWM did not, however, identify individual documents, describe their contents, or clarify how the Exemption applies in each instance it was invoked in support of withholding information. Instead, OCRWM’s Determination Letter provides only a general statement that there are documents consisting of a specific number of pages that are attorney work-product or were prepared by an attorney and are confidential communications. This justification for invoking Exemption 5 is the type of conclusory explanation that we have previously found to be invalid. *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,528 (1984). It lacks sufficient specificity to permit the requester and the appellate authority to understand the rationale for the various withholdings.

At the administrative level, such as the present review, determinations under the FOIA must include a general description of the denied material, a statement of the reason for the denial, and an explanation of how the specific exemption applies to the withheld information. *Natural Resources Defense Council*, 20 DOE ¶ 80,145 at 80,627 (1990); *William R. Bowling, II*, 20 DOE ¶ 80,134 at 80,596-97 (1990). We will remand the matter to OCRWM in order that it set forth a description of the documents and, for each document or portion of document withheld, identify the privilege claimed under Exemption 5 and provide an explanation of how that privilege applies. On remand, OCRWM may group documents of similar type into categories, but must specifically identify each document in a category and ensure that the explanation of the withholding applies to each document in the category.

#### *2. Segregability*

The Appellant argued that OCRWM failed to segregate factual portions of the withheld documents. The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such records after deletion of the portions which are exempt under this

subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester. The attorney work-product privilege, however, affords sweeping protection to factual materials. *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983). Nevertheless, OCRWM bears the burden of showing that the privilege applies to all the information it withholds under that privilege. On remand, OCRWM must consider whether any of the information it intends to withhold under Exemption 5 through claim of privilege can be segregated and released.<sup>5/</sup>

### 3. *The Public Interest*

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that “[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. 1004.1. Since we are remanding the matter to OCRWM, we need not weigh the public interest in release of the information. This is a matter for OCRWM to consider on remand, and it will be subject to review in the event of a future appeal.

## III. CONCLUSION

OCRWM conducted a search reasonably calculated to uncover the information sought by the Appellant. However, we are remanding the matter to OCRWM concerning a number of matters. OCRWM should make a further determination concerning whether the specific documents described in Section A of this decision are responsive to the Appellant's request. Further, we are remanding the matter to OCRWM so that it may provide an adequate justification of how Exemption 5 applies to the documents or portions of documents it has withheld, including identifying the documents and determining whether any factual information can be reasonably segregated or should be released in the public interest. Therefore, the Appeal will be denied in part, granted in part, and remanded to OCRWM for a new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada on January 5, 2005, Case No. TFA-0083, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

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<sup>5/</sup> It is possible that release of a memorandum dated May 5, 2003--from Lee Liberman Otis, DOE General Counsel, to a large internal distribution list--constitutes waiver of the attorney work-product privilege with respect to certain documents. On remand, OCRWM should consider whether this release has waived the privilege and, consequently, protection under Exemption 5.

(2) This matter is hereby remanded to Office of Civilian Radioactive Waste Management of the Department of Energy which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 24, 2005